STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN McNAMARA	:	ORDER DTA NO. 813361
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1989 through February 28, 1991.	:	

On April 6, 1998, petitioner, John McNamara, filed a motion to recuse the administrative law judge presently assigned to his case. On April 29, 1998, the Division of Taxation ("Division") filed a letter in opposition to petitioner's motion. In addition, on May 7, 1998, petitioner submitted a reply to the Division's letter in opposition. However, at no point did petitioner seek permission to submit a reply. Section 3000.8(a)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.8[a][2]) requires that a motion for recusal comply with the procedural provisions of Part 3000 of the Rules of Practice and Procedure. Section 3000.5(b) of the Rules of Practice and Procedure (20 NYCRR 3000.5[b]), which sets forth the procedure for filing a motion, provides that "[r]eplies to responses will not be entertained except with the permission of the administrative law judge." Accordingly, I am now granting petitioner permission to file a reply so that petitioner's reply may be considered in the rendering of this order. Petitioner is represented in this matter by Eugene B. Fischer, Esq. The Division is represented by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

PROCEDURAL HISTORY

1. On September 7, 1997, Administrative Law Judge Winifred M. Maloney issued a determination in this matter granting the Division's motion for summary determination and dismissing the petition of John McNamara based upon a finding that petitioner's request for conciliation conference was filed well after the 90-day statutory period and that since petitioner's request was untimely, the Division of Tax Appeals had no jurisdiction to hear petitioner's case. Upon exception, the Tax Appeals Tribunal reversed the summary determination of the administrative law judge in a decision dated January 30, 1997 and ordered that the matter be placed upon the Hearing Calendar in the Division of Tax Appeals as soon as possible based upon a finding by the Tax Appeals Tribunal that there existed a material and triable issue of fact regarding the mailing of the Notice of Determination to petitioner.

2. On January 31, 1997, Daniel Ranalli, the Assistant Chief Administrative Law Judge, requested the parties to select a date for the hearing. On March 24, 1997, he advised the parties that the case would be heard on April 30, 1997 in Troy, New York. In addition, on March 24, 1997 the Calendar Clerk of the Division of Tax Appeals advised the parties that the hearing scheduled for April 30, 1997 would be limited to the issue of the timeliness of the petition since that was a threshold jurisdictional issue.

3. By letter dated April 4, 1997, petitioner objected to the bifurcation of the hearing to first resolve the jurisdictional issue and requested that a full hearing be scheduled in New York City. In response, Assistant Chief Administrative Law Judge Daniel Ranalli advised petitioner in a letter dated April 7, 1997 that the jurisdictional issue would be decided first and that the case could not be fit into the New York City hearing schedule.

4. By letter dated April 15, 1997, the Division's representative invited petitioner to submit

an Offer in Compromise to settle this matter on the basis of doubts as to collectibility. On April 21, 1997, petitioner's representative sent to the Assistant Chief Administrative Law Judge a facsimile transmission asking if the April 30, 1997 hearing was still scheduled. He indicated that he had received the Division's Hearing Memorandum and until then had assumed that the Division's representative had contacted the Division of Tax Appeals to request an adjournment of the hearing pending completion of the Offer in Compromise process. He also indicated that on the assumption that the hearing was being adjourned, he had refrained from issuing subpoenas to witnesses that the Division's representative refused to produce voluntarily. The Hearing Memorandum indicated that the Division was calling no witnesses at the hearing but was submitting affidavits to support proof of mailing of the Notice of Determination.

5. On April 23, 1997, petitioner's representative submitted his Hearing Memorandum together with a cover letter indicating that the hearing should not go forward since the Division had sent him a written acceptance of his offer to settle. On April 28, 1997, the Division's representative responded by letter challenging Mr. Fischer's characterization of her letter as an acceptance of his offer to settle the matter. At no time did petitioner's representative submit a written request for adjournment of the hearing. At no time did the Division's representative submit a written request for adjournment of the hearing. At no time did Assistant Chief Administrative Law Judge Ranalli deny such a request for adjournment. At no time prior to the hearing did petitioner submit an Offer in Compromise to the Division to settle this matter.

6. On April 30, 1997, a timeliness hearing was held on remand. Administrative Law Judge Maloney presided over the hearing. At the hearing, petitioner's representative requested that the hearing be continued because he intended to file an Offer in Compromise and because he wished to review the Division's exhibits and return for oral argument at another time. In addition,

petitioner's representative requested that the affiants whose affidavits had been submitted into evidence by the Division be subpoenaed to testify in person or, in the alternative, that the affidavits be precluded from evidence. These requests were denied by the administrative law judge.

7. In her September 7, 1997 determination, Administrative Law Judge Maloney, in reciting the procedural history of this matter, made reference to "[a] Tax Compliance Levy ('levy') issued by the Division [which] was received by Fleet Bank of Connecticut on November 22, 1994." She also made reference to a December 6, 1994 letter from petitioner's former representative, J. Timothy Shea, to E. Carlsson, an employee of the Division. Copies of Mr. Shea's letter along with a collection notice, a payment document, a consolidated statement of tax liabilities and the tax compliance levy referred to above were sent by Mr. Shea to the Division of Tax Appeals and included in petitioner's case file.

OPINION

A. Section 3000.8(a)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.8[a][1]) provides that:

> Either party may move before the supervising administrative law judge to recuse the administrative law judge or presiding officer assigned to its case on the basis that the administrative law judge or presiding officer has a personal bias with respect to the case or that the administrative law judge or presiding officer is otherwise disqualified to hear and decide the case.

The personal bias referred to in the regulation is not defined in the regulation. However, it is clear that this concept is not limited to the personal or pecuniary interest of the administrative law judge. Many other concepts are included as well (***1616 Second Ave. Restaurant v. New York State Liquor Authority***, 75NY2d 158, 551 NYS2d 461). An administrative law judge demonstrates a personal bias when he takes some action which indicates that he is not impartial

and cannot consider the case with an open mind, but rather has some disposition to find against one of the parties (***Tumminia v. Kuhlman***, 139 Misc 2d 394, 527 NYS2d 673). However, this demonstration of personal bias must be palpable and must be evident from the record. It cannot be based on speculation or some person's subjective impression.

B. Petitioner asserts that:

> 7. On April 30, 1997, a second hearing was held at the Division of Tax Appeals in Troy, New York, on remand. Judge Maloney was assigned as the Administrative Law Judge. The Petitioner was given no advance notice of her assignment and therefore had no ability to protest her assignment or request that she recuse herself.
>
> (a) Judge Maloney should have refused the assignment or recused herself. Canon 3 of the Code of Judicial Conduct is entitled "A Judge Should Perform the Duties of His Office Impartially and Diligently." It is implausible that the Petitioner would believe that Judge Maloney could be impartial in a hearing on remand, when the Tax Appeal Tribunal's decision to reverse and remand appeared to be so highly critical of Judge Maloney's decision.

Tax Law § 2006(7) and regulation section 3000.17(e)(2) both provide that the Tax Appeals Tribunal shall issue a decision either affirming, reversing or modifying the determination of an administrative law judge or the Tribunal may remand the matter "for additional proceedings before the administrative law judge." Cases on remand are routinely assigned to the administrative law judge who first dealt with the case. Moreover, petitioner's representative made no objection of any kind to the assignment of this matter to Administrative Law Judge Maloney either before, during or at the conclusion of the hearing. It is not clear why petitioner's representative thought he "had no ability to protest her assignment." Regulation section 3000.8(a)(2) specifically provides that "[t]he supervising administrative law judge may entertain an oral motion [for recusal] made under this section if necessary." In any event, petitioner's subjective impression by itself is not grounds to recuse an administrative law judge in the absence of any demonstrable bias.

C. Petitioner also asserts that:

> (b) At the hearing on April 30, 1997, I twice requested continuances, once at the beginning of the hearing on the grounds that a settlement offer in the form of an Offer-in-Compromise ("OIC") was in the process of being prepared, which would provide the Respondent with all of the funds set aside by the Federal District Court in an Order of Restitution, to settle the matter. I indicated that the Respondent's counsel, Ms. Seifert, herself, had provided the forms to make the OIC after she sent to me a letter stating "Upon review, including review by counsel, the offer seems to be reasonable in the context of collectibility . . ."

* * *

> At the conclusion of the hearing, I requested a continuance in order that I could study more carefully the various Exhibits that the Respondent had put into evidence, in order to respond more effectively to them. *Both requests were denied* by Judge Maloney. Tax Law Section 2000 states that the DTA was established to provide the public with a "just system" of resolving (tax) controversies, and "to ensure that the elements of due process are present with regard to such resolution of controversies."
>
> * * *
>
> The Petitioner was entitled to a continuance in the first instance, on the basis of the proposed OIC alone, based upon my request, and if the Department's counsel objected, Judge Maloney should have reminded her of her professional responsibilities and disregarded her objections. There was no possible harm to the Department, and the only reason for a hearing was to harass and intimidate the Petitioner, because Office of Counsel knew that my client was in prison and had no funds, and it is expensive to have a hearing in Troy rather than at a location convenient to Petitioner's counsel, in New York City.
>
> In the second instance, it is a clear violation of due process to deny a continuance for the purpose of giving opposing counsel an opportunity to fully analyze documents submitted at the hearing for the first time, and respond to the ALJ appropriately thereafter. If such opportunities are denied, and we are left with a system in which oral argument is obviated and all determinations are made on exhibits and pleadings, without an opportunity to examine or respond to same.
>
> Judge Maloney has demonstrated continued bias against the Petitioner, and a disregard for the purpose for which the Division of Tax Appeals was established in her denials of continuances. (Emphasis in original.)

The possibility that a petitioner *might* file an Offer in Compromise is not a sufficient reason in my opinion to continue a hearing. Petitioner makes no reference to statute, regulation or case law which bestows upon a litigant the right to a continuance merely because he might file an Offer in Compromise. Moreover, petitioner has indicated that the Federal District Court set aside funds to pay taxes in October of 1996. On the date of the hearing, some six months later, petitioner still had not submitted his Offer in Compromise. In fact, he did not submit his Offer in Compromise until August 14, 1997, which was 3½ months after the hearing. The Offer in Compromise was ultimately rejected by the Commissioner of Taxation. With the benefit of hindsight, we can see that Administrative Law Judge Maloney's judgement was quite sound on this point and the considerable delays sought by petitioner were not warranted.

In addition, it should be remembered that the hearing of April 30, 1997 was not a hearing on the merits but merely one to determine whether the Division of Tax Appeals has jurisdiction over this matter. The hearing process and the Offer in Compromise process are totally independent of each other. Petitioner could and did pursue a settlement with the Division of

Taxation while litigating the jurisdictional issue before the Division of Tax Appeals. Petitioner has not suffered any prejudice as a result of proceeding with both at the same time and certainly has not demonstrated any bias on the part of Judge Maloney in relation thereto.

It is petitioner's contention that it is a clear violation of due process and a demonstration of Administrative Law Judge Maloney's bias that she did not grant a continuance in order to allow the opposing attorneys to analyze the documents submitted at hearing and then return to present oral argument before the administrative law judge. Regulation section 3000.15(d)(6) provides that "[a]fter the parties have completed the submission of the evidence, they may orally argue the applicability of the law to the facts. If the parties also wish to submit briefs, they may do so, within the time restrictions fixed by the administrative law judge."

While brief oral summations are sometimes presented by representatives after the submission of the evidence, it would be unusual in the extreme to require the parties to return solely to present an oral summation. Petitioner's representative does not (and I dare say cannot) refer to any instance in the entire history of the Division of Tax Appeals where an administrative law judge required the parties to return after the conclusion of the hearing so that the representatives could give oral argument. I fail to see how it demonstrates bias that this administrative law judge continued that unbroken string.

With respect to the alleged denial of due process, I cannot imagine anything that petitioner's representative could say at oral argument which he could not say in the brief and reply brief he is filing in this matter. Petitioner has cited no authority for the proposition that due process is denied if one is forced to present one's arguments in written form.

D. Petitioner also asserts that:

> (c) I also made a request that the Office of Counsel's affiants be subpoenaed, as there is a substantial question concerning their [sic] credibility of the affiants, and not merely questions concerning the contents of the affidavits. Judge Maloney denied the request.
>
> (d) I made a motion to preclude the affidavits based on the failure of the affiants to testify in support of the affidavits. Judge Maloney denied the motion.

Section 3000.7 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.7) authorizes administrative law judges to issue subpoenas to require the attendance of witnesses. In addition, it provides that an attorney representing any party in a proceeding before the Division of Tax Appeals may issue a subpoena pursuant to section 2302 of the CPLR. Section 3000.7(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.7[b]) requires that requests for subpoenas be submitted in writing at least 20 days in advance of the hearing. If an administrative law judge has not been assigned to the case, requests may be made to the supervising administrative law judge. In addition, section 3000.15(d)(3) of the Rules provides:

> (3) If a party refuses or fails without reasonable cause to obey any subpoena or subpoena duces tecum issued by an administrative law judge, the administrative law judge shall have the power to preclude the noncomplying party from introducing any proofs concerning such witnesses, documents or things, or from introducing them in evidence and may draw the inference that the precluded evidence is unfavorable to the noncomplying party's position.

Similarly, the Tax Appeals Tribunal has ruled in the ***Matter of Donahue*** (Tax Appeals Tribunal, December 8, 1994) that under circumstances where a Division employee has been subpoenaed by petitioner's attorney and has failed to appear without explanation or prior notice, it would be appropriate to draw the strongest possible inference against the Division from the Division's employee's failure to appear at hearing.

Accordingly, if the presence of the Division's witnesses was crucial to petitioner's case, petitioner's representative was remiss in not making a timely request that they be subpoenaed by the administrative law judge. Failing that, petitioner's representative was aware that the affiants were not scheduled to attend the hearing and had the opportunity to subpoena them himself. Instead, he simply did nothing and waited for the hearing to request the subpoenas. Administrative Law Judge Maloney simply followed the rules of the Tax Appeals Tribunal in her rulings. She denied petitioner's request for subpoenas because the request was untimely. Since the affiants had never been subpoenaed to testify, there was no basis to preclude their affidavits under section 3000.15(d). Petitioner's representative was, to say the least, less than diligent in preparing for the hearing apparently because he hoped that the matter would be settled. The facts of this case do not demonstrate that the administrative law judge was biased. If anything, they demonstrate the perils of relying too much on a settlement which fails to materialize.

E. In petitioner's reply to the Division's response, petitioner asserts that:

> Of course, we are now left with a major unanswered question. How did Judge Maloney get the documents which were not in the record, but which she included in her Findings of Fact in her Determination on the Division's Motion for Summary Determination? Nowhere in the Petition, the Answer, the Division's affidavits, or the Petitioner's affidavits, is there any reference to (1) "A Tax Compliance Levy issued by the Division. . . (page 3 of Determination); (2) the letter from Petitioner's former representative to "E. Carlson of Collections" dated December 6, 1994 (page 5 of the Determination); (3) the "standard procedures set forth in the Domestic Mail Manual" (page 20 of the Determination) . . . . It would be in the interest of justice to permit the Counsel for the Division to explain, in response hereto, how documents (1) and (2) referred to in the preceding paragraph, which were in the Division's, and not in the record, came to be included in Judge Maloney's determination.

.

It seems that Mr. Fischer suspects some conspiracy on the part of the administrative law judge and the Division's representative wherein Division documents were secretly sent to the administrative law judge by the Division's representative. However, the answer is much simpler. A review of the documents indicates that copies were sent by petitioner's representative, Mr. Shea, to the Division of Tax Appeals at the same time that they were sent to the Division.

F. In a similar vein, Petitioner's representative asserts that:

> 8. Judge Maloney entered the hearing room after Ms. Seifert and I were

> already there. Upon entering she greeted Ms. Seifert by her first name and entered into a conversation with her. As I was on the opposite side and in the rear of the room, I did not hear any part of the conversation.

It seems that petitioner's representative suspects some improper conversation on the part of the administrative law judge and the Division's counsel. However, in light of the small size of the Division of Tax Appeals hearing rooms, I cannot understand how petitioner's representative could have failed to hear any part of the conversation. Petitioner's representative does not explain this. Moreover, he made no objection on the record regarding this conversation. This is also unexplained. Thus, we are left with no idea of what actually transpired. In the absence of any facts as to what was said, I do not find this conversation evidence of bias.

G. Filed with the instant motion but not part of it was a request by petitioner that the assistant chief administrative law judge not participate in any way in this matter. Petitioner complains that Judge Ranalli denied his April 21, 1997 request for a continuance, denied his request for a hearing in New York City and assigned the hearing to Administrative Law Judge Maloney. A review of the April 21, 1997 communication reveals that petitioner never requested a continuance (petitioner actually means an adjournment) of the hearing but merely asked whether the hearing was still scheduled. Petitioner's assertion that Judge Ranalli denied his request for an adjournment is simply factually incorrect.

Petitioner waited until three weeks before the hearing to request that the hearing be moved to New York City even though he knew about the hearing for three months. Because of scheduling and notice limitations it is not possible to switch a hearing from Troy to New York City if petitioner waits until three weeks before the hearing to make the request. Accordingly, petitioner's allegations in this regard are baseless.

Finally, as has been noted previously, it is the practice in the Division of Tax Appeals to

assign a case to the same administrative law judge all the way through the tax appeals process. If petitioner had any objection to this practice, he had the opportunity to make that objection known before the hearing. It is hardly Judge Ranalli's fault that petitioner chose not to do so.

H. The motion of John McNamara for recusal of the administrative law judge presently assigned to this matter is denied.

DATED: Troy, New York

_____

CHIEF ADMINISTRATIVE LAW JUDGE